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Number of Pages Including this Page: 14 +
USPN 5,624,428 (14 columns)

- 1) Appeal Brief & Appendices (12 pages)
- 2) Evidence Appendix reference USPN 5,624,428
- 3) Fee Transmittal (1 page)
- 4)
- 5)

Inventor(s): Nakahata, et al.

S.N.: 10/733,620

Filed: December 11, 2003

Docket # AA610

Comments:

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/733,620
Inventor(s) : Hiroshi Nakahata et al.
Filed : December 11, 2003
Art Unit : 3761
Examiner : Catharine L. Anderson
Docket No. : AA610
Confirmation No. : 8502
Customer No. : 27752
Titled : Absorbent Article Having Stretchable Fastening Member

APPEAL BRIEF

Mail Stop Appeal Briefs – Patents

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

Dear Sir,

This Brief is filed pursuant to the appeal from the U.S. Patent and Trademark Office Final Office Action dated May 4, 2006. A timely notice of Appeal was filed on August 3, 2006.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

STATUS OF CLAIMS

Claims 1 – 8 are pending and stand rejected. Claims 1 – 8 are being appealed. A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

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STATUS OF AMENDMENTS

No amendment was filed subsequent to the appeal from Final Action of May 4, 2006.

SUMMARY OF THE CLAIMED SUBJECT MATTER

Claim 1 relates to an absorbent article comprising a chassis and a stretchable fastening member, the chassis extending longitudinally and laterally and comprising a liquid pervious topsheet, a liquid impervious backsheet and an absorbent core disposed therebetween (see *inter alia* page 5, lines 1-24 and items number 20, 30, 31, 32, 33 and in Fig. 1), the stretchable fastening member comprising a fixed portion permanently joined to the chassis, a distal portion provided with a fastening material and a stretchable panel positioned between the fixed portion and the distal portion, the stretchable fastening member being joined to the chassis such that the distal portion is positioned laterally outwardly from the fixed portion in the flat-out configuration of the stretchable fastening member (see *inter alia* page 7, lines 13-25 and items number 42, 44, 46 and 48 and in Figs. 2-5), wherein the stretchable panel of the stretchable fastening member comprises a first stretchable zone and a second stretchable zone disposed in the lateral direction, the first stretchable zone is capable of providing extensibility upon an initially applied extension force, and extensibility of the second stretchable zone is restricted by a restriction means until the restriction means is inactivated (see *inter alia* page 8, lines 21-33 and items number 60, 62 and 64 and in Figs. 2-5), and the restriction means is inactivated upon a further applied extension force such that the second stretchable zone provides an additional extensibility to reduce a stress developed in the stretchable panel (see *inter alia* page 8, lines 33-36 and page 9, lines 1-4 and items number 42, 44, 46 and 48 and in Figs. 2-5).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

- 1) Claims 1, 3, 5 and 7 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Sauer (US Patent 5,624,428).
- 2) Claims 2 and 6 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Sauer (US Patent 5,624,428).

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3) Claims 4 and 8 are objected to as being dependent upon a rejected claim, but have been indicated as being allowable if rewritten in independent form including all of the limitations of the base claims and any intervening claims.

A copy of the Sauer reference is provided in the Evidence Appendix.

ARGUMENTS

1) **Claims 1, 3, 5 and 7 are not anticipated under 35 U.S.C. § 102(b) by Sauer.**

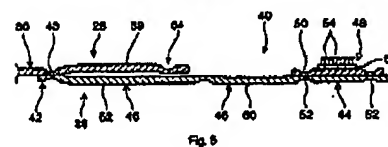
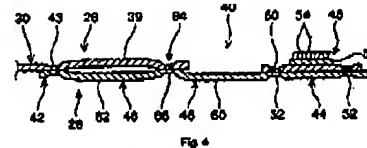
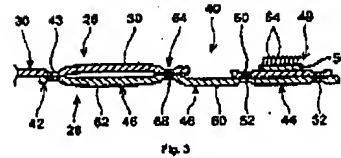
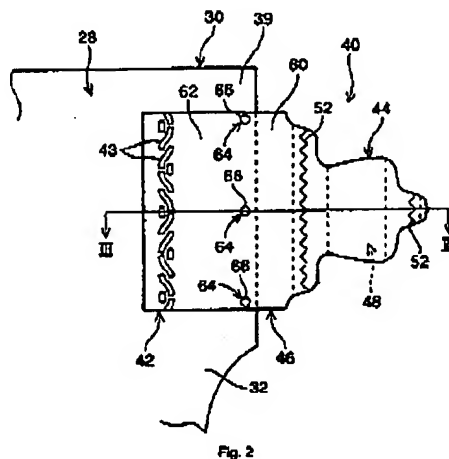
It is well-settled that in order to anticipate a claim, the reference must teach each and every element of the claim. MPEP §2131. "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." MPEP §2131 citing *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987).

Applicants remind the Office that independent claim 1 includes the features of a stretchable fastening member comprising a fixed portion permanently joined to a chassis, a distal portion provided with a fastening material and a stretchable panel positioned between the fixed portion and the distal portion. Independent claim 1 also requires that the stretchable panel of the stretchable fastening member comprises a first stretchable zone and a second stretchable zone disposed in the lateral direction. Independent claim 1 also requires that the first stretchable zone is capable of providing extensibility upon an initially applied extension force, and extensibility of the second stretchable zone is restricted by a restriction means until the restriction means is inactivated, and the restriction means is inactivated upon a further applied extension force such that the second stretchable zone provides an additional extensibility to reduce a stress developed in the stretchable panel.

For the sake of clarity, Figures 2-5 illustrating an embodiment of Applicants' claimed invention are depicted below.

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As can be seen in Figs. 2-5, a stretchable panel 46 comprises a first stretchable zone 60 and a second stretchable zone 62. The present application discloses that:

[t]he first stretchable zone 60 is capable of providing extensibility upon an initially applied extension force generated by pulling the stretchable fastening member 40. However, extensibility of the second stretchable zone 62 is restricted by a restriction means 64 until the restriction means 64 is inactivated. Therefore, the only first stretchable zone 60 provides extensibility upon an initially applied extension force and the extensibility of the second stretchable zone 62 is preserved until the restriction means 64 is inactivated. (See *inter alia* page 8, lines 27-33)

In the Final Rejection dated May 4, 2006, the Office asserted:

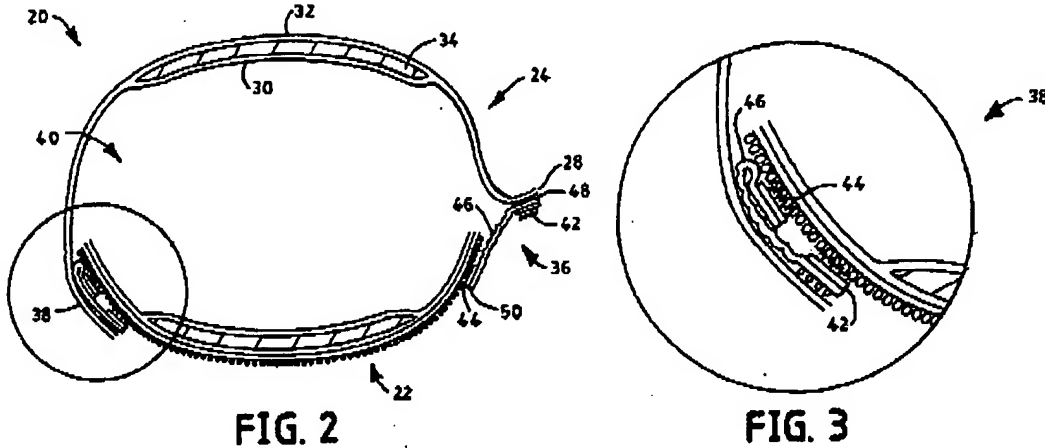
Sauer discloses an absorbent article, as shown in figure 1, comprising a chassis 20 and a stretchable fastening member 46. The chassis 20 comprises a liquid pervious topsheet 30, a liquid impervious backsheet 32, and an absorbent core 34. The stretchable fastening member 46 comprises a fixed portion joined to the chassis, as shown in figure 3, having a distal portion provided with a fastening material 44 and a stretchable panel positioned therebetween. The stretchable fastening member 46 comprises first and second stretchable zones, the second fastening zone being restricted by a restriction means 42, as shown in figure 3. When sufficient force is applied the second stretchable zone provides additional extensibility, as disclosed in column 8, lines 35-39. (See page 3 of the Final Office Action dated May 4, 2006)

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Applicants respectfully disagree.

As best understood by Applicants, the fastening means 36 of Sauer includes an expansion member 46 which are both shown in Figures 2 and 3 depicted below.



As best understood by Applicants the expansion member 46 of Sauer does not include a first stretchable zone capable of providing extensibility upon an initially applied extension force, and a second stretchable zone whose extensibility is restricted by a restriction means until the restriction means is inactivated, and the restriction means is inactivated upon a further applied extension force such that the second stretchable zone provides an additional extensibility to reduce a stress developed in the stretchable panel.

Applicants note that although Sauer discloses that "the expansion may occur when at least one of the primary fasteners 42 is disengaged from the front portion 22 of the absorbent article while the secondary fasteners 44 remain releasably engaged with the front portion 22 of the absorbent article" (see Col 9, lines 17-21), Sauer does not teach or even remotely suggest that expansion of the fastening means or expansion member 46 may occur without disengaging the primary fastener. As best understood by Applicants, the expansion member 46 of Sauer includes a single stretchable zone which may expand when the primary fastener 42 is disengaged. In other words, when the primary fastener 42 is disengaged such that the fastening means of Sauer includes a distal portion including a fastening material, Applicants submit that in such a case, the expansion member 46 only includes a single stretchable zone and as a result, it does not include a second stretchable zone extensibility of the second stretchable zone is restricted by a

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restriction means until the restriction means is inactivated, and the restriction means is inactivated upon a further applied extension force such that the second stretchable zone provides an additional extensibility to reduce a stress developed in the stretchable panel.

It is therefore Applicants' position that the fastening means of Sauer '428 does not include a first and a second stretchable zone as presently claimed.

In the Final Rejection dated May 4, 2006, the Office also asserted:

In response to Applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e. the first stretchable zone being stretched to its limit in order for the restriction means to be inactivated) are not recited in the rejected claim(s). (Emphasis added, see page 2 of the Final Rejection dated May 4, 2006)

Applicants respectfully submit that Applicants have not presented the previously stated arguments. However, Applicants have reminded the Office of the features which are part of independent claim 1. Some of these features are the stretchable panel of the stretchable fastening member that comprises a first stretchable zone and a second stretchable zone disposed in the lateral direction, the first stretchable zone is capable of providing extensibility upon an initially applied extension force, and extensibility of the second stretchable zone is restricted by a restriction means until the restriction means is inactivated, and the restriction means is inactivated upon a further applied extension force such that the second stretchable zone provides an additional extensibility to reduce a stress developed in the stretchable panel

Since the Sauer reference does not teach all the features of independent claim 1, Applicant submits that the rejection of claim 1 under 35 U.S.C. § 102(b) was improper. Consequently, the rejections of claims 3, 5 and 7 which depend directly or indirectly on claim 1 was also improper.

2) Claims 2 and 6 are patentable over Sauer under 35 U.S.C. § 103(a)

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Applicants submit that claim 2 depends on independent claim 1, and that claim 6 depends on claim 3 which itself depends on independent claim 1.

Applicant submits that since the rejections of claim 1 under 35 U.S.C. § 102(b) was improper, the Office has the burden to make a proper *prima facie* case of obviousness for these claims before it can allege that claims 2 and 6 are unpatentable under 35 U.S.C. § 103(a).

Assuming *arguendo*, that the rejections of claim 1 as being anticipated by Sauer under 35 U.S.C. § 102(b) were proper, Applicants submit that the Office still fails to establish a *prima facie* case of obviousness for claims 2 and 6.

It is well-accepted patent law that "[t]o establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation ... to modify the reference or to combine the reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in applicant's disclosure." (Emphasis supplied) *In re Vaeck*, 947 F.2d 488, USPQ 2d 1438 (Fed Cir. 1991).

Applicants submit that the Office reasoning is merely conclusory and does not provide a proper *prima facie* analysis of obviousness. .

SUMMARY

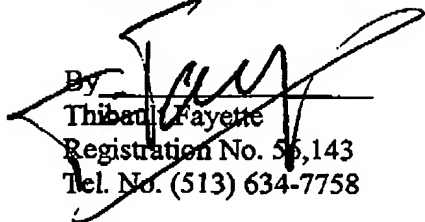
Claims 1-3 and 5-7 have not been properly rejected in the Final Action for all of the reasons discussed above.

The rejections of claims 1, 3, 5 and 7 appear to stem from an improper characterization of the scope and content of the Sauer reference. The rejections of claims 2 and 6 appear to be based on an improper obviousness analysis.

As such, the rejections should all be reversed by the Honorable Board of Appeals and Interferences.

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Respectfully Submitted,

By 
Thibault Payette
Registration No. 56,143
Tel. No. (513) 634-7758

Date: October 3, 2006
Customer No. 27752

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CLAIMS APPENDIX (Serial No. 10/733,620)

Appealed Claims – Case AA610

1. (Rejected) An absorbent article comprising a chassis and a stretchable fastening member, the chassis extending longitudinally and laterally and comprising a liquid pervious topsheet, a liquid impervious backsheet and an absorbent core disposed therebetween, the stretchable fastening member comprising a fixed portion permanently joined to the chassis, a distal portion provided with a fastening material and a stretchable panel positioned between the fixed portion and the distal portion, the stretchable fastening member being joined to the chassis such that the distal portion is positioned laterally outwardly from the fixed portion in the flat-out configuration of the stretchable fastening member, wherein the stretchable panel of the stretchable fastening member comprises a first stretchable zone and a second stretchable zone disposed in the lateral direction, the first stretchable zone is capable of providing extensibility upon an initially applied extension force, and extensibility of the second stretchable zone is restricted by a restriction means until the restriction means is inactivated, and the restriction means is inactivated upon a further applied extension force such that the second stretchable zone provides an additional extensibility to reduce a stress developed in the stretchable panel.
2. (Rejected) The absorbent article of Claim 1 wherein the restriction means is inactivated upon the applied extension force being not more than 350 g/25mm.
3. (Rejected) The absorbent article of Claim 1 wherein the chassis comprises a side flap being less stretchable than the stretchable panel, and at least a portion of the stretchable panel is superposed on the side flap of the chassis wherein, the restriction means comprises a bonding means to detachably join a portion of the stretchable panel to the side flap of the chassis between the fixed portion and the distal portion to provide the first stretchable zone extending

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between the distal portion and the bonding means and the second stretchable zone extending between the fixed portion and the bonding means.

4. (Rejected) The absorbent article of Claim 3 wherein the bonding means is provided in the configuration where the stretchable panel is unfolded.
5. (Rejected) The absorbent article of Claim 3 wherein the side flap of the chassis is non-stretchable.
6. (Rejected) The absorbent article of Claim 3 wherein the bonding means is detached upon the applied extension force being not more than 350 g/25mm.
7. (Rejected) The absorbent article of Claim 3 wherein the bonding means comprises a waist bonding means and a leg bonding means.
8. (Rejected) The absorbent article of Claim 7 wherein the bonding strength of the waist bonding means is different from the bonding strength of the leg bonding means.

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EVIDENCE APPENDIX (Serial No. 10/733,620)

A copy of US Patent 5,624,428 to Sauer is attached herewith.

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RELATED PROCEEDINGS APPENDIX (Serial No. 10/733,620)

There is no additional information for the Related Proceedings Appendix in this appeal.

FEE TRANSMITTAL for FY 2006 Patent fees are subject to annual revision. Effective December 8, 2004	Complete if Known	
	Application Number	10/733,620
	Confirmation Number	8502
	Filing Date	December 11, 2003
	First Named Inventor	Kiroshi Nakahata
	Examiner Name	Catharine L. Anderson
	Art Unit	3761
TOTAL AMOUNT OF PAYMENT (\$500)		Docket No. AA610

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METHOD OF PAYMENT		FEE CALCULATION (continued)																																														
1. <input checked="" type="checkbox"/> The Director is hereby authorized to charge indicated fees submitted on this form, credit any over payments, and charge any additional fee(s) during the pendency of this application to: Deposit Account Number: 16-2480 Deposit Account Name: The Procter & Gamble Company		5. ADDITIONAL FEES <table border="1"> <thead> <tr> <th>Fee Description</th> <th></th> <th>Fee Paid</th> </tr> </thead> <tbody> <tr> <td>Extension for reply within 1st month</td> <td>(\$120)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Extension for reply within 2nd month</td> <td>(\$450)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Extension for reply within 3rd month</td> <td>(\$1,020)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Extension for reply within 4th month</td> <td>(\$1,590)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Extension for reply within 5th month</td> <td>(\$2,160)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Information Disclosure Statement fee</td> <td>(\$180)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>37 CFR 1.16(f) Late Oath/Declaration (nonprovisional)</td> <td>(\$130)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>37 CFR 1.17 (g) Surcharge - Late provisional filing fee or cover sheet</td> <td>(\$50)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Non-English specification</td> <td>(\$130)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Notice of Appeal</td> <td>(\$500)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Filing a brief in support of an appeal</td> <td>(\$500)</td> <td><input checked="" type="checkbox"/> {500}</td> </tr> <tr> <td>Request for oral hearing</td> <td>(\$1,000)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Acceptance of unintentionally delayed claim for priority under 35 U.S.C. 119, 120, 121, or 365 (a) or (c)</td> <td>(\$1,370)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Other:</td> <td></td> <td><input type="checkbox"/></td> </tr> </tbody> </table>		Fee Description		Fee Paid	Extension for reply within 1 st month	(\$120)	<input type="checkbox"/>	Extension for reply within 2 nd month	(\$450)	<input type="checkbox"/>	Extension for reply within 3 rd month	(\$1,020)	<input type="checkbox"/>	Extension for reply within 4 th month	(\$1,590)	<input type="checkbox"/>	Extension for reply within 5 th month	(\$2,160)	<input type="checkbox"/>	Information Disclosure Statement fee	(\$180)	<input type="checkbox"/>	37 CFR 1.16(f) Late Oath/Declaration (nonprovisional)	(\$130)	<input type="checkbox"/>	37 CFR 1.17 (g) Surcharge - Late provisional filing fee or cover sheet	(\$50)	<input type="checkbox"/>	Non-English specification	(\$130)	<input type="checkbox"/>	Notice of Appeal	(\$500)	<input type="checkbox"/>	Filing a brief in support of an appeal	(\$500)	<input checked="" type="checkbox"/> {500}	Request for oral hearing	(\$1,000)	<input type="checkbox"/>	Acceptance of unintentionally delayed claim for priority under 35 U.S.C. 119, 120, 121, or 365 (a) or (c)	(\$1,370)	<input type="checkbox"/>	Other:		<input type="checkbox"/>
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4. EXTRA CLAIM FEES FOR UTILITY AND REISSUE: <table border="1"> <thead> <tr> <th></th> <th>Extra Claims</th> <th>Fee from Below</th> <th>Fee Paid</th> </tr> </thead> <tbody> <tr> <td>Total Claims <input type="checkbox"/> - 20** = <input type="checkbox"/> x</td> <td><input type="checkbox"/></td> <td>=</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Independent Claims <input type="checkbox"/> - 3** = <input type="checkbox"/> x</td> <td><input type="checkbox"/></td> <td>=</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Multiple Dependent claims:</td> <td><input type="checkbox"/></td> <td>=</td> <td><input type="checkbox"/></td> </tr> </tbody> </table> ** or number previously paid, if greater, For Reissues, see below Fee Description Claims in excess of 20 (\$50 per claim) Independent claims in excess of 3 (\$200 per claim) Multiple dependent claim, if not paid (\$360) **Reissue: each independent claim over 3 and more than in the original patent (\$200 per claim) **Reissue claims: each claim over 20 and more than original patent (\$50 per claim) SUBTOTAL (4) (\$) <input type="checkbox"/>			Extra Claims	Fee from Below	Fee Paid	Total Claims <input type="checkbox"/> - 20** = <input type="checkbox"/> x	<input type="checkbox"/>	=	<input type="checkbox"/>	Independent Claims <input type="checkbox"/> - 3** = <input type="checkbox"/> x	<input type="checkbox"/>	=	<input type="checkbox"/>	Multiple Dependent claims:	<input type="checkbox"/>	=	<input type="checkbox"/>	SUBTOTAL (5) (\$) {500}																														
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SUBMITTED BY		Complete (if applicable)	
Name (Print/Type)	Thibault Boyette	Registration No.	56,143
		(Attorney/Agent)	
Signature		Telephone	(513) 634-7758
		Date	10/03/2006

This collection of information is required by 37 CFR 1.17. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed information. The collection of information on the amount of time used are required to complete this form and/or suggestions for reducing the burden.